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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE LUMMI INDIAN TRIBE, QUINAULT INDIAN NATION

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SUBJECT INDEX

	Page
Motion For Leave To File Amici Curiae And Statement Of Consent	1
Interest Of Amicus Curiae Quinault Indian Nation	2
Interest Of Amicus Curiae Lummi Indian Tribe	4
Argument	6
Introduction	6
Legal and Practical Effects of Petitioners' Theories	7
Analysis of Modern Supreme Court Decisions	8
Analysis of Basic Supreme Court Decisions	15
The American Policy Review Commission Report	20
Conclusion	21

TABLES OF AUTHORITY

Table of Cases

Cherokee Intermarriage Cases, 203 U.S. 76 (1906) 18

Cherokee Nation v. Georgia, 5 Pet (30 U.S.) 1 (1831) 7, 15, 17

Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904) 18

Ex Parte Crow Dog, 109 U.S. 556 (1883) 7, 16

Fisher v. District Court, 424 U.S. 382 (1976) 9, 10, 11

Jones v. Meehan, 175 U.S. 1 (1900) 19

Keeble v. United States, 412 U.S. 205 (1973) 13

In re Mayfield, 141 U.S. 107 (1891) 17-18

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 11, 13-14, 15

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 9-10

Morris v. Hitchcock, 194 U.S. 384 (1903), *aff'g* 21 App.D.C. 565 (1903) 19, 20

Page

Morton v. Mancari, 417 U.S. 535 (1974) 12, 13

Nofire v. United States, 164 U.S. 667 (1897) 18

Puyallup Tribe v. Washington Department of Game, ... U.S. ....., 53 L. Ed. 2d 667 (1977) 7, 8

Talton v. Mayes, 163 U.S. 376 (1896) 7, 18-19

Tom v. Sutton, 523 F.2d 1101 (9th Cir. 1976) 5

United States v. Antelope, ... U.S. ....., 51 L. Ed. 2d 701 (1977) 8

United States v. Kagama, 118 U.S. 375 (1886) 11, 14, 16-17, 19

United States v. Mazurie, 419 U.S. 544, 51 L. Ed. 2d 707 (1975) 8-9, 11, 12, 13

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 8

United States v. Washington, 384 F.Supp. 312 (1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert den.*, 423 U.S. 1086 (1976) 2

Wall v. Williamson, 8 Ala. 48 (1845) 16

Williams v. Lee, 358 U.S. 217 (1959) 12, 14

Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832) 11, 14, 16, 17

Statutes

Act of March 3, 1873, 23 Stat. 385 §9 16

Indian Reorganization Act, §16, 48 Sstat. 987, 25 U.S.C. §476 10

Major Crimes Act, 18 U.S.C. §1153 ..... 7, 13, 16

Public Law 93-580 20

Treaty of Olympia, 12 Stat. 971, II Kapp. 719 (1855) .. 2

Treaty of Point Elliott, 12 Stat. 927, II Kapp. 697 (1855) 4, 7

Page

18 U.S.C. §1152 7

25 U.S.C. §1302 12

Other Authorities

Final Report Of The American Indian Policy Review Commission of May 17, 1977 20

Final Report Of The Task Force On Federal, State, and Tribal Jurisdiction To The American Indian Policy Review Commission, published July, 1976 20

55 I.D. 14 (1937) 10

51 Notre Dame L. 600 (1976) 19

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MOTION FOR LEAVE TO FILE AMICI CURIAE AND STATEMENT OF CONSENT

The Lummi Indian Tribe and the Quinault Indian Nation have sought and received consent from attorneys for petitioners and respondents in this matter. Letters of consent are on file with the clerk of this Court.

The Lummi Indian Tribe and the Quinault Indian Nation hereby request leave of the Court to file a brief Amici Curiae supporting the position of the Suquamish Indian Tribe.

INTEREST OF AMICUS CURIAE QUINAULT INDIAN NATION

This Amicus Brief is submitted in part by the Quinault Indian Nation of the Quinault Indian Reservation, Washington. The Quinault Nation is an organized, self-governing, federally recognized Indian tribe. *United States v. Washington*, 384 F. Supp. 312 (1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), and is a successor to signatory tribes of the Treaty of Olympia, 12 Stat. 971, II KAPP. 719 (1855).

The Quinault Indian Nation governs a 200,000-acre reservation on the Olympic Peninsula within the boundaries of the State of Washington. The reservation is heavily forested and three small villages constitute its only sites of resident population. Approximately 2,500 persons reside on the reservation; approximately 600 are non-Indian. One-third of the lands on the reservation are in fee status and two-thirds are held in trust by the United States for individual allottees and the Tribe. The fee lands are scattered around the reservation in a random, checkerboard pattern.

A substantial forestry industry operates on the reservation bringing large numbers of non-Indians to the reservation each day. Many hundreds of miles of road cross the reservation, and four rivers and a large lake are within the reservation boundaries.

Law enforcement is almost exclusively provided by a force of some sixteen tribal and Bureau of Indian Affairs police officers. Even the federal highway which passes through the reservation in various places is rarely patrolled by State of Washington patrolmen, because it is too remote from state substations to allow for routine patrol.

The Quinault tribal court, consisting of tribal and appellate divisions, is established under the Quinault Constitution and tribal code as an independent branch of the tribal government. The Court sits daily at the village of Taholah and has its judicial roots in the Tribal Fisheries Court established in 1917. The Quinault Nation employs a prosecutor and a defender; the defender represents any person requesting his or her services.

The Quinault Nation began taking jurisdiction over non-Indians in some land-use matters in 1967. In 1969, pursuant to the enactment of tribal trespass ordinances to protect the beaches and waters of the reservation, the Quinault Nation took jurisdiction over non-Indians involved in various criminal trespass offenses on the reservation.

On March 31, 1973, the Quinault Nation adopted a revised tribal code which assumes civil and criminal jurisdiction over all persons acting within the boundaries of the reservation. The Quinault Nation could then adequately protect all persons and property within its territory, as well as the lands and waters, forests and wildlife. Without such jurisdiction, the only practical remedy the Tribe would have for violation of its laws regarding hunting, fishing, timber theft, business licensing, and misdemeanor crimes, would be to exercise its specific treaty power to expel from the reservation all non-Indians it found to be undesirable. Resort to the federal courts for such minor offenses would be difficult, not only in distance (between 100-150 miles), but in obtaining the interest and participation of federal prosecutors in such distinctly reservation matters.

Since 1969, numerous petty offenses committed by non-Indians on the Quinault Indian Reservation have been

dealt with through the mechanism of the Quinault Tribal Code and the Quinault tribal courts. Cases of a civil nature brought by or against non-Indians in the Quinault courts are less frequent, but have been steadily increasing in the past four or five years. 1977 tribal court statistics show that about one-third of the criminal cases and one-half of the civil cases involve non-Indian parties.

Cases are tried to the court and to juries of six persons drawn from all of the Indian and non-Indian residents on the Reservation.

INTEREST OF AMICUS CURIAE LUMMI INDIAN TRIBE

The Lummi Indian Tribe joins with the Quinault Indian Nation in submitting this Amicus Brief. The Lummi Indian Tribe is a federally recognized Tribe of American Indians signatory to the Treaty of Point Elliott, 12 Stat. 927, II KAPP. 697 (1855), and organized under a Constitution and By-Laws approved by the Secretary of the Interior.

The Lummi Tribe governs the Lummi Indian Reservation, located some ten miles northwest of the City of Bellingham, Washington. Of the 12,000 acres within the Reservation, some 5,000 acres are tidelands owned in trust by the United States for the Tribe; some 3,500 acres are owned in trust for the Tribe and individual Indians; and some 2,500 acres are owned in fee by individual non-Indians. The fee patent acres are scattered throughout the upland area. Portage Island, a 1,000-acre island within the Reservation, is owned by the Whatcom County Park Board, and is intended to be a major park facility serving large numbers of non-Indian persons. The Park Board maintains no independent park police.

The Reservation serves as a home for approximately 1,800 Indian people, most of whom are supported by fishing or through tribal employment. Some 2,000 non-Indians are permanent residents of the Reservation; they commute to Bellingham or nearby factories. A substantial seasonal population, as many as 2,000 more non-Indians, stay on the Reservation during the summer. The northern boundary of the Reservation is a major arterial highway. Whatcom County operates a ferry from Lummi Island (off the Reservation) to the Reservation. Several hundred people live on the Island and the ferry is the only access.

In 1974, the Lummi Tribal Code was amended to take misdemeanor and traffic jurisdiction over all persons within the Reservation. The amended code has been approved by the Secretary of the Interior. The Lummi Reservation Court, consisting of trial appellate branches, operates under this Code. *See, Tom v. Sutton*, 523 F.2d 1101 (9th Cir. 1976). In 1977, approximately 25% of traffic offenses and 15% of other criminal cases involved non-Indians; and 23% of the civil actions had non-Indian parties. The Lummi Tribe employs a prosecutor and a defender; the defender is available without charge to any person accused of committing a crime.

The Lummi Tribe and the Bureau of Indian Affairs employs 8 police officers and 5 fisheries officers to patrol the Reservation. There are no Whatcom County deputy sheriffs who are regularly assigned to the Reservation, and the Washington State Patrol patrols only the State highway bordering the Reservation.

ARGUMENT

Introduction

Amici will discuss the doctrine of tribal sovereignty as used by this Court. A number of recent decisions together with several leading earlier opinions, will be analyzed. This Court's consistent use of the residual tribal authority stemming from original tribal sovereignty and not from the United States Constitution or from Congressional acts will be demonstrated.

Amici present this discussion to aid in answering the narrow question at the heart of this case; does the residual sovereignty of the Suquamish Indian Tribe include that petit criminal jurisdiction over non-members which is necessary to preserve the peace on the Port Madison Reservation?

Throughout the history of the United States this Court has recognized that Indian tribal governments retain governmental powers not based on the Constitution or laws of the United States. Those tribal governmental powers are based upon the sovereign powers exercised by the tribes prior to the coming of the Europeans to the North American Continent. This Court has recognized that these powers are not divested without specific Congressional enactment and has called them dependent-sovereign or quasi-sovereign powers.

Petitioners err when they contend that the very limited criminal jurisdiction that the Suquamish Tribe seeks to have confirmed in these cases cannot be confirmed without a showing of specific Congressional grant of petit criminal

jurisdiction to Indian tribes. The tribal power is grounded in the residual sovereignty of the tribes.

Petitioners err when they claim that because the Congress can remove or limit the residual sovereignty of the tribes, that residual sovereignty therefore does not exist.

Petitioners err when they claim that residual sovereignty is a "mere veil" used only to cloak the doctrine of federal preemption when tribal interests are infringed upon by actions of the states.

Legal and Practical Effects of Petitioners' Theories

Accepting petitioner's arguments may require overruling *Talton v. Mayes*, 163 U.S. 376 (1896), and upsetting a coherent body of law established in *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 (1831), and stretching to last term's decision in *Puyallup Tribe v. Washington Department of Game*, ... U.S. ....., 53 L. Ed. 2d 667 (1977).

A number of serious practical problems immediately arise if petitioners are correct in their formulations, not the least of which involves tribal jurisdiction over crimes committed an trust land by its own members. There is no federal statute granting the tribe criminal jurisdiction over crimes committed by Suquamish Indians on the Port Madison Reservation, nor is such specifically reserved to the Tribe by the Treaty of Point Elliott, 12 Stat. 927, II KAPP. 697 (1855). *See* 18 U.S.C. §1152. The federal courts have no cognizance of the crime. *See*, 18 U.S.C. §1153, *Ex Parte Crow Dog*, 109 U.S. 556 (1883). (In *Crow Dog*, this Court assumed the existence of exclusive tribal jurisdiction without a federal grant to the Tribe. *See*, discus-

sion *infra.*) Thus, under petitioners' logic, there would be no government able to keep the peace on Indian reservations absent some positive Congressional grant of authority. Reservations would be without law enforcement as regards minor crimes involving only Indians.

Analysis of Modern Supreme Court Decisions

This Court most recently dealt with tribal sovereignty in *Puyallup Tribe v. Washington Department of Game*, ... U.S. ....., 53 L. Ed. 2d 667 (1977). The Puyallup Tribe interposed its sovereign immunity from suit against an action by the State of Washington. This Court did not hesitate to uphold that assertion of sovereign immunity by the Tribe. ..... U.S. ....., 53 L. Ed. 2d at 674. No federal statute conveyed such immunity from suit to the Puyallup Tribe, nor can it be argued that such a specific and pervasive immunity is the result of some statutory scheme of federal tribal relations.

Thus, if tribal sovereign immunity exists, it must be based upon the existence of a tribal governmental entity capable of maintaining and asserting its own sovereignty. *See, United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

In *United States v. Antelope*, ... U.S. ....., 51 L. Ed. 2d 701 (1977), this Court was faced with a challenge to the Major Crimes Act based on the supposed racially discriminatory classification separating Indians from other citizens. Relying on the inherent authority of tribal governments, this Court repeated with favor the language of *United States v. Mazurie*, 419 U.S. 544 (1975):

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515 (1832); they are a separate people possessing the power of regulating their internal and social relations. . . . 419 U.S. 544, 557, 51 L. Ed. 2d at 707.

Discussing the use of federal law in dealing with Indians, this Court stated that Congress may legislate even in a fashion which denies Indians a benefit or privilege to non-Indians. Such Congressional action cannot be defeated by claiming that this denial is an impermissable racial classification, because the classification is not based on race, but on the unique status of the members of Indian tribes as separate people "with their own *political* institutions. Federal regulation of Indian tribes, therefore, is governance of once sovereign political communities." 51 L. Ed. 2d at 707. (Emphasis added).

If those tribal political institutions did not remain intact, this Court would not rely on them to decide the jurisdictional framework in which a serious criminal charge is to be determined. Once again, however, no indication is given of any specific federal statute which grants to Indian tribes the governmental powers that have been denoted as quasi-sovereignty.

In *Fisher v. District Court*, 424 U.S. 382 (1976), this Court upheld the power of the Northern Cheyenne Tribal Court to adjudicate the rights of reservation Indians residing on the reservation in adoption matters.

> In 1935, the (Northern Cheyenne) Tribe adopted a Constitution and By-Laws pursuant to §16 of the Indian Reorganization Act, 48 Stat. 987, 25 U.S.C. §476, a statute specifically intended to encourage Indian tribes to *revitalize* their self-government. *Mescalero*

> *Apache Tribe, supra,* at 151. 425 U.S. at 387. (Emphasis added).

Significantly, this Court has continued to choose the word "revitalize" in discussing the impact of the Indian Reorganization Act on tribal government. The prior existence of tribal governmental power is unquestioned. More importantly, though, the continuing power of the tribal government to assert sovereign authority over the domestic relations and child custody relationships among persons on the reservation is unquestioned.

Where did this sovereign power relied upon in *Fisher* come from? There is no federal statute conferring such jurisdiction on tribal governments. Section 16 of the Indian Reorganization Act allows tribes electing to come under the Act to adopt a Constitution. That section does not, however, specify the content of the Constitution and its specific terms deal only with the employment of legal counsel, the use of tribal lands, and negotiations with other governments.[1]

The Constitution of the Northern Cheyenne Tribe is the basis for the power exercised by the tribal court in *Fisher.* That Constitution must be asserting powers pursuant to that portion of §16 which says:

> In addition to all powers vested in any Indian tribe or tribal council *by existing law* . . . . *See,* 55 I.D. 14 (1934). (Emphasis supplied)

If there is no existing federal law granting tribes power to deal with domestic relations and child custody, the existing law referred to must be that of the Tribe. The ap-

1. The Northern Cheyenne Tribal Code as cited in *Fisher, supra,* appears to assert some jurisdiction over non-members and non-Indians when such persons are involved in an attempt to adopt a Northern Cheyenne child.

proval of existing tribal law must be considered the recognition of residual, or inherent, sovereignty which has not been removed by Congress.

This is not to say that Congress could not remove this authority and grant it to the states or to some federal agency. In *Fisher,* this Court recognized several times that the quasi-sovereignty maintained by the Northern Cheyenne Tribe is both at the pleasure of, and protected by, the federal sovereign.

But until the federal sovereign acts to remove such power from the Tribe, *Fisher* at 388, the Tribe continues to exercise it when the relevant incidents occur within the territorial boundaries of the reservation. *Fisher, supra* n. 14.

In *United States v. Mazurie,* 419 U.S. 544 (1975), this Court did not decide whether the independent authority of the tribe to regulate the distribution and use of intoxicants on the reservation was in itself sufficient to impose a regulatory scheme upon non-Indian retailers of alcohol and beverages. 419 U.S. at 557. Tribal authority over the reservation independent of the federal statute was recognized, however, and the source of that authority was not conceived to be a federal grant of power from statute or treaty.

To support the recognition of the independent tribal power, the Court, instead of looking to treaties or federal law, looked instead to the analysis of tribal powers found in *Worcester v. Georgia,* 6 Pet. 515 (1832); *United States v. Kagama,* 118 U.S. 375 (1886); and *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973). In none of these cases is independent tribal authority related to any federal grant of power.

If there is no grant of federal power, the source of tribal authority discussed by this Court in *Mazurie* must be within the governmental power of the Tribe itself. Undoubtedly tribal governmental power may be and is limited by federal law and treaties.[2] Similarly, however, there is no law or treaty prohibits the Suquamish Tribe from exercising petit criminal jurisdiction over all persons who enter its Reservation.

In *Mazurie*, this Court explained that *Williams v. Lee*, 358 U.S. 217 (1959), had considered the problem of tribal governmental assertions of jurisdiction over non-Indians acting within the boundaries of the Reservation. 419 U.S. at 558. According to the *Mazurie* Court, *Williams* found that the Navajo Nation retained jurisdiction over non-Indians, not because of a grant of federal authority, but because the federal government had recognized the Navajo governmental authority over their Reservation by concluding a treaty with that Tribe in 1868. *Id.* As in the Treaty with the Navajo, there is no formal or specific recognition of tribal government power over non-Indians in the Treaty with the Suquamish.

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court recognized "the unique legal status of Indian tribes under federal law," 417 U.S. at 551, and drew upon the status of certain Indians "as members of quasi-sovereign tribal entities," 417 U.S. at 554, to determine that federal statutes providing for employment preference in the Bureau of Indian Affairs for members of federally recognized tribes was not racially based and therefore not fatally invidious

2. For example, Petitioners here, over and above the due process safeguards of the Suquamish Tribal Code and Constitution, are protected by the due process provision of 25 U.S.C. §1302.

discrimination. Again, there was no statute that the Court could or did point to which would require recognition of Indian tribes as the political entities the Court described. The limited sovereignty of the Tribe was simply noted and accepted by the Court after reciting the legal precedent for recognizing the existence of such tribal polity.

In both *Mazurie* and *Mancari* the doctrine of tribal sovereignty is not relied upon by this Court to avoid assertions of state jurisdiction on reservations. If tribal sovereignty were a "mere veil" for federal preemption, this Court could not have cited the doctrine as a basis for its holdings.

In *Keeble v. United States*, 414 U.S. 205 (1973), this Court recognized the jurisdiction of the tribal courts as "residual." 412 U.S. at 209, 214. This Court required that a lesser included offense instruction be given in a federal prosecution for a violation of the Major Crimes Act, 18 U.S.C. §1153, even though that lesser included offense, under the federal statute limiting the jurisdiction of federal courts to Major Crimes Act offense, could only be charged in a tribal court. In a careful examination of federal and tribal court jurisdiction on Indian reservations, this Court found no federal statutes granting judicial power to Indian tribes. Tribal judicial power could only be characterized as a portion of the quasi-sovereign "residual" power of a federally recognized Indian Tribe.

Once again, this Court used the doctrine of limited tribal sovereignty not to defeat state assertions of jurisdiction on the reservation, but to determine a question of federal law.

In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), this Court while not basing its decision on the

concept of residual sovereignty, discusses this doctrine at length. The opinion does not deny its relevance to the question of whether a state tax might be successfully levied on the income of a reservation Indian earned on the reservation. Instead this Court stated that while the conceptual clarity of Chief Justice Marshall's opinion in *Worcester v. Georgia, supra,* had been modified to deal with changed circumstances and the legitimate interests of states in regulating the affairs of non-Indians on the reservation:

> From the very first days of our government, the federal government has been permitting the Indians largely to govern themselves, 411 U.S. at 170.
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution to the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long pre-dates that of our own government.

411 U.S. at 172.

The opinion in *McClanahan* cited with approval statements in *United States v. Kagama, supra,* which recognized the limited sovereignty of Indian tribal governments, and in *Williams v. Lee, supra,* which allowed that limited sovereignty to be asserted over non-Indians.

The importance of limited tribal sovereignty in *McClanahan* cannot be denied, since this Court found no affirmative statement in any statute or treaty protecting the Navajo Indians from the tax claims of the State of Arizona, but instead stated near the end of the opinion:

> We are far from convinced that when a state imposes taxes upon reservation members without their consent,

> its action can be reconciled with tribal self-determination.

411 U.S. at 179. Thus, while the *McClanahan* decision is used to argue that limited sovereignty of tribal government has somehow disappeared because of changed circumstances, it is difficult to see how the *McClanahan* conclusion relating to the tax immunity of reservation Indians might have been reached without dependence upon the historic and legal recognition of limited and inherent tribal sovereignty.

Analysis of Basic Supreme Court Decisions

The older decisions of this Court have utilized the doctrine of tribal sovereignty in a number of different areas over the past century-and-a-half. Selected leading cases will be analyzed in the following pages.

Cherokee Nation v. Georgia, 5 Pet. (30 U.S.) 1 (1831), was an original action in this Court in which the Cherokee Nation claimed to be either a foreign state or a state of the Union with the Constitution. In denying either status, Chief Justice Marshall declared the Nation neither fish nor fowl, but a "domestic dependent nation," whose "relation to the United States resembles that of a ward to his guardian." 5 Pet. at 16. Indian tribes are not foreign nations, *not because they are not nations,* but because they are *not foreign.* 5 Pet. at 19. The Court left open the question of which governmental powers the Cherokee Nation retained and exercised, but clearly recognized that a quantum of residual sovereignty and governmental power was retained by the Cherokee Nation. There was, of course, no federal statute granting to the Nation that power.

The next term, in *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832), the Chief Justice enunciated the touchstone for determining the residual powers of an Indian tribe: Indian tribes in the first instance possessed all natural rights of independent political communities; when they came under the protection of a stronger power, they relinquished some of these powers; what was not surrendered or removed remains. 6 Pet. (31 U.S.) at 559-61. Only positive enactments by the conqueror alter the laws of a conquered state. *Wall v. Williamson*, 8 Ala. 48, 51 (1845). In *Worcester*, this Court recognized that one of the residual powers of tribes was to permit persons to travel and preach within their own territory.

Affirming the necessity of positive Congressional action to deprive an Indian tribe of its criminal jurisdiction, this Court in *Ex Parte Crow Dog*, 109 U.S. 556 (1883), released an Indian convicted of murdering another Indian within the Sioux Reservation on the grounds that the Tribe had *exclusive* jurisdiction over the crime. While acknowledging that Congress had undoubted power to remove this jurisdiction from the Tribe, without such legislation, the Tribe retained this portion of its original sovereignty. (Congress acted with dispatch, Act of March 3, 1873, 23 Stat. 385, §9).

The validity of this Act (The Major Crimes Act, now 18 U.S.C. §1153) was soon questioned in *United States v. Kagama*, 118 U.S. 375 (1886). Kagama, an Indian, was accused of murdering another Indian within the Hoopa Reservation in California. This Court sustained the indictment against challenges to the constitutionality of the statute and to the interference with the exclusive jurisdiction

of the Tribe. These challenges were rejected using the analyses found in *Cherokee Nation v. Georgia, supra*, and *Worcester v. Georgia, supra*. Since tribes are dependent sovereigns, the general sovereign can enact laws for the dependent's benefit and governance. The states have no power to interfere with a sovereign dependent upon the United States, and thus the federal government must have this ability, for there are only two applicable sovereignties within the boundaries of the United States. 118 U.S. at 380-82.

The direct challenge to tribal sovereignty was avoided by using the guardian-ward relationship between the federal government and the Tribe found in *Cherokee Nation, supra*, yet this Court once again characterized Indian tribes as having a semi-indendent position, not possessed of the full attributes of sovereignty, but with the power of regulating their internal and social relations. 118 U.S. at 381-82. This Court recognized that Indian tribes were too weak to provide their own protection and protection of others among them whom they dwell, and that the states were often the Indians deadliest enemies. Thus, the guardian-ward relationship required federal protection of the powers of tribal governments and of the Indians themselves.

The opinion in *Kagama* presents no discussion of the effects of the Major Crimes Act on the previously exclusive tribal jurisdiction over major crimes found in *Crow Dog*, and does not intimate that tribal jurisdiction over such crimes may have been affected. Without explicit removal of the original sovereign power to punish wrongdoers, it remains. *Worcester v. Georgia, supra*.

The determination of tribal citizenship, remains within the limited sovereignty of the tribe. *In re Mayfield*, 141

U.S. 107 (1891), involved a petition for writ of habeas corpus against confinement as a result of a federal conviction for adultery in the Cherokee Territory. Petitioner was an adopted member of the Cherokee Nation, and was born a non-Indian. This Court held the adoption of Mayfield under the laws and customs of the Cherokee Nation was sufficient to make this a crime in which tribal jurisdiction was exclusive, because only Indians were involved. *See also, Nofire v. United States,* 164 U.S. 667 (1897).

The sovereign power of tribes to determine citizenship and the political rights appurtenant thereto was also upheld as a legitimate means for apportioning federal allotments of land in the *Cherokee Intermarriage Cases,* 203 U.S. 76 (1906). Similarly, the rights of all the members of the Deleware Tribe, who settled in Cherokee Territory, were determined by the Cherokee law under which the Delawares were allowed to settle in the Cherokee lands. *Delaware Indians v. Cherokee Nation,* 193 U.S. 127 (1904) In none of these cases does this Court rely upon a federal grant of any power to determine citizenship by the tribes. Neither do any of these cases involve the use of the limited tribal sovereignty as a shield against the jurisdictional assertions of the states.

Talton v. Mayes, 163 U.S. 376 (1896), bears directly on the question of whether tribal governments derive their limited powers from original sovereignty or from a positive federal grant:

> The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee Nation are federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that

> Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this Court have long since answered the former question in the negative.

163 U.S. at 382-3. *Talton v. Mayes* is often glibly cited for the proposition that the Constitution does not apply to acts of tribal governments. *See, e.g.* Brief of Amicus Curiae Attorney General, State of Washington, at 28. But no analysis of *why* the Constitution does not apply is made. This Court has consistently held that there is a residuum of inherent sovereignty of Indian tribes still capable of supporting tribal governmental actions independent of any grant from the Congress. Other courts and certain academics, *e.g.,* 51 Notre Dame L. 600 (1976), may deny this limited survival of inherent tribal power, but this Court has regularly affirmed its existence, even when ruling that its exercise is curtailed in certain areas. *See, United States v. Kagama, supra.*

This Court approved the power of the tribe to determine inheritance by tribal custom in *Jones v. Meehan,* 175 U.S. 1 (1900). At issue were the rights of the eldest son of a chief, who inherited under Red Lake Chippewa law, and his five siblings, who would receive equal shares under the substantive law urged by the United States. Without finding an express grant to the Chippewa to employ traditional law, this Court upheld the application of tribal law regarding descent and distribution.

Conflict between the tribal government and a non-citizen appeared in *Morris v. Hitchcock,* 194 U.S. 384 (1903), *aff'g* 21 App.D.C. 565 (1903). The Chickasaw Nation had

imposed a tax on all stock animals grazed on the reservation. Morris, a non-Indian, asserted that the Tribe did not have the power to tax him. This Court replied that the right to condition entry into the tribal territory (a sovereign right) supported the imposition of the tax. The Treaties with the Chickasaw sanctioned this power, and the Curtis Act, which otherwise limited Chickasaw tribal government, had as one of its objects the continued exercise of the legislative power of the Tribe, including the power to tax.

The legislative and taxing powers of the Tribe are both residual powers of the independent sovereignty once enjoyed by the Chickasaw Nation. Similarly, *Morris v. Hitchcock* did not involve the use of tribal sovereignty to defeat any assertion of state authority.

The American Policy Review Commission Report

In 1974, the Congress of the United States commissioned a comprehensive study of Indians and Indian tribes in the United States. Public Law 93-580. A select Commission consisting of seven members of Congress and five Indian leaders served on the American Indian Policy Review Commission. The result of that study are now available, and the Court may desire to take note of the *Final Report of the American Indian Policy Review Commission* of May 17, 1977, in particular, Ch. 3 "Doctrines of American Indian Law," and Ch. 5 "Tribal Government." The staff of the American Indian Policy Review Commission also produced several studies, including the *Final Report of the Task Force On Federal, State, and Tribal Jurisdiction To the American Indian Policy Review Commission*, published July, 1976.

CONCLUSION

Amici have demonstrated that there is a consistent line of cases in this Court stretching back over 150 years which recognize and rely upon the sovereign powers still retained by Indian tribes from times prior to the existence of the United States. This coherent body of law affirms that the limited sovereignty exercised by Indian tribes today does not derive from positive grants of governmental power by the United States through treaty or by the Congress through federal statute.

This Court also relies upon the doctrine of tribal sovereignty in a variety of substantive areas, and does not rely upon inherent tribal powers only when tribal actions are thrown into conflict with state assertions of jurisdiction.

The narrow issue presented by the cases is whether or not the Suquamish Indian Tribe possesses the governmental authority to protect all persons within its reservation from minor crimes. Because the power to punish any individual for petit offenses has never been removed from the Suquamish Tribe by the United States, this power still remains.

DATED this 27th day of October, 1977.

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